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In the Supreme Court of the United States

OCTOBER TERM, 1980

ASSOCIATED GENERAL CONTRACTORS OF CALIFORNIA, INC., PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

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QUESTION PRESENTED

Whether, in the circumstances of this case, the Board properly concluded that petitioner, a trade association bargaining collectively on behalf of some of its members, was required to disclose the names of all its members to the unions with which it bargains.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A) is reported at 633 F. 2d 766. The decision and order of the National Labor Relations Board (Pet. App. C) and the decision and order of the Administrative Law Judge (Pet. App. D) are reported at 242 N.L.R.B. No. 124.

JURISDICTION

The judgment of the court of appeals was entered on October 16, 1980. A petition for rehearing was denied on December 22, 1980. The petition for a writ of certiorari was filed on March 12, 1981. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. Petitioner is a trade association representing construction contractors. Certain of its members have authorized it to represent them in collective bargaining with two unions

(Pet. App. A 3),[1] and it has negotiated collective bargaining agreements with the unions since 1942 (*id.* at 4). Others of its members—those classified by petitioner as "open shop" members[2]—were not subject to collective bargaining agreements when they joined petitioner (*id.* at 3-4), and did not expressly authorize petitioner to represent them in collective bargaining. But at the time the dispute involved in this case arose, the unions contended that the collective bargaining agreement between petitioner and one of the unions bound all of petitioner's members (Pet. App. A 4-5; Pet. App. C 6-7 & n.4).

Petitioner customarily furnished the unions with the names of those members who had concededly authorized petitioner to bargain collectively on their behalf. In late 1976 and early 1977, near the end of the term of one collective bargaining agreement and while another was being negotiated (Pet. App. A 7-8; Pet. App. C 14-16), the unions asked petitioner to furnish them a roster of all its members. The unions said they needed this information for three principal reasons (Pet. App. A 7-8). First, some firms in petitioner's industry have a practice of changing their names in order to evade their obligations under collective bargaining agreements (*ibid.*); the unions wanted the names of petitioner's members to ensure that none of them was engaged in this practice (*id.* at 7). Second, and related, some of petitioner's members owned both an operation subject to the collective bargaining agreement and an "open shop"

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[1]The unions are the 46 California Counties Carpenters Conference Board, United Brotherhood of Carpenters & Joiners of North America, AFL-CIO, and the Northern California District Council of Laborers, Laborers' International Union of North America, AFL-CIO (Pet. App. A 4 nn.2, 3).

[2]Petitioner has both "open shop" and "open shop specialty" categories (Pet. App. A 3-4). Differences between these categories are immaterial to this case and we refer to both categories together as the "open shop" category.

operation (*id.* at 14; Pet. App. C 18); the unions feared that this arrangement might be used to evade the agreements (Pet. App. A 7). Third, the unions wanted the names of petitioners' members in order to advance their claim that the "open shop" members were also obligated to engage in collective bargaining (*id.* at 8).

Petitioner's refusal to furnish the names of its "open shop" members in response to the unions' request is the basis of this unfair labor practice proceeding, charging petitioner with violating Section 8(a)(5) and Section 8(a)(1) of the National Labor Relations Act, 29 U.S.C. 158(a)(5), 158(a)(1) (Pet. App. A 7-8; Pet. App. C 3). The Administrative Law Judge dismissed the complaint (Pet. App. D). He ruled that petitioner's "open shop" members were not subject to the collective bargaining agreements (*id.* at 21-22), and appeared to conclude that this alone invalidated the unions' request for information (see *id.* at 21, 25, 26). He did not discuss in detail the reasons the unions had advanced for requesting the information; instead, he appeared to assume that the unions' only possible purpose in seeking the names of the "open shop" members was to attempt to organize them (*id.* at 22-24).[3]

2. The Board reversed the Administrative Law Judge and ordered that the names of petitioner's "open shop" members be disclosed to the unions (Pet. App. C).[4] The

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[3]In this context, the Administrative Law Judge said that to grant the unions the information they sought would "smack of participating in the notorious 'top down' mode of organizing employees" (Pet. App. D 23).

[4]In addition to the "open shop" members, other categories of petitioner's members—"affiliate" and "honorary" members—also have not expressly authorized petitioner to bargain on their behalf (Pet. App. A 3). The unions' initial request, as upheld by the Board, apparently covered the names of members in these categories as well, but the court of appeals enforced only that portion of the Board's order that dealt with "open shop" members (Pet. App. A 25). The Board has not sought review of that ruling.

Board held that the Administrative Law Judge "erred in failing to examine the principal issue raised in the complaint—whether the requested information had probable and potential relevance to the Unions' statutory obligation to represent employees within the contractual bargaining units * * *" (*id.* at 4). The Board held that the unions were entitled to the information they sought because that information was "relevant and necessary" to the unions' administration of the collective bargaining agreements, to the "intelligent assessment of the advisability of filing grievances or taking other remedial action," and to the formulation of proposals in negotiations on the new collective bargaining agreement (*id.* at 23-24, 26). The Board identified two particular ways in which the information would aid the unions in carrying out these functions. First, it would help the unions determine if any of petitioner's members were attempting to evade the collective bargaining agreements by changing their names (*id.* at 17); the Board noted that the governing collective bargaining agreements bound an employer " 'regardless of whether * * * he or it changes the name or style or address of his or its business' " (*id.* at 8). Second, the Board found that some of petitioner's members who were subject to the collective bargaining agreement also owned "open shop" enterprises (*id.* at 18); "[d]epending on the underlying facts and circumstances of each case," the Board said, "the collective-bargaining agreement covering the employees of the unionized firm may be held to cover the employees of the nonunion firm as well * * *" (*id.* at 11-12 n.5). Therefore, the Board concluded, the unions needed the names of petitioner's "open shop" members in order to help determine whether some of them were in fact bound by the collective bargaining agreements (*id.* at 20).[5]

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[5]The Board intimated that the unions' claim that one collective bargaining agreement covered petitioner's "open shop" members was substantial; it pointed out that that agreement was, by its terms, " 'binding upon all persons, firms, or corporations that * * * are, or during the

The Board rejected, for two reasons, petitioner's argument that because it informed the unions of any name changes by those of its members who were concededly bound by the agreement, it did not have to disclose its roster (Pet. App. C 20-21). First, the Board said, petitioner made no reports on "open shop" members who shared ownership or supervision with members concededly bound to the contracts; petitioner, the Board said, was not entitled to decide unilaterally that these "open shop" members were not so closely tied to members of the collective bargaining unit as to be subject to the collective bargaining argeement (*id.* at 21-22 & n.9). Instead, petitioner was required to give the unions the names they needed in order to make their own investigation (*id.* at 23-24). Second, the Board questioned the accuracy of petitioner's investigations into common ownership (*id.* at 21-23 n.9).[6] Petitioner also urged that the unions' real reason for requesting the names was to aid their efforts to organize the "open shop" employees (*id.* at 27). The Board rejected the Administrative Law Judge's conclusions to this effect as "speculation and conjecture" that had no substantial support in the record (*id.* at 4). In any event, the Board said, "where a union's request for information is for a proper and legitimate purpose, it cannot make any

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term hereof become, members' " of petitioner (Pet. App. C 7). But the Board expressly pretermitted the question whether petitioner's "open shop" members were bound by that agreement (Pet. App. C 7 n.4), saying that it did not rely on this "as a basis for establishing the relevance of the requested information" (*ibid.*).

[6]The Board also pointed out that petitioner had sponsored seminars and programs on common ownership and other techniques its members might use to avoid becoming subject to collective bargaining agreements (Pet. App. C 11). The Board did not say, however, that petitioner advocated that contractors subject to collective bargaining agreements evade their obligations. The Board also noted that the number of petitioner's "open shop" members had increased sharply in the years before the unions' request for information (*id.* at 16-17 & n.6).

difference that there may also be other reasons for the request or that the data may be put to other uses" (*id.* at 27-28).

3. The court of appeals enforced the Board's order (Pet. App. A). It held that the unions had met their burden of showing the relevance of the information to their collective bargaining duties (*id.* at 13-15). The court said that because some of petitioner's members owned both union and non-union enterprises, and because petitioner had encouraged such common ownership, the unions had "an objective basis for their suspicions" that the collective bargaining agreements were being violated (*id.* at 17 n.6) and had shown that "the information [they] sought is relevant to investigations of contract violations, and that there is a reasonable basis for further investigation" (*id.* at 14-15). The court rejected petitioner's argument that the membership list was insufficiently relevant because it would not enable the unions to uncover violations; the court said that the list "would enable the unions to investigate specific Open Shop members rather than having to examine all * * * members * * *. It is sufficient * * * that the roster would aid in the unions' investigation of contract violations" (*id.* at 19). The court endorsed the Board's rejection of the Administrative Law Judge's conclusion that the unions' only genuine interest was in using the list to organize (*id.* at 20-21 & n.8), holding that at least when there was no history of misuse—and, the court said, there was none in this case—the mere possibility that the information might be used for another purpose did not disqualify the unions from obtaining it (*id.* at 20-21). Finally, the court of appeals rejected petitioner's suggestion that the unions might use the list to harass petitioner's members, saying that "[n]othing in the record support[ed]" this suggestion; it also rejected, for reasons similar to those given by the Board, petitioner's claim that its own review of its members' practices obviated the need for the unions to investigate (*id.* at 23-24). The

court concluded that "[n]o persuasive reason for nondisclosure is established in the record, nor has [petitioner] proposed any practicable alternative to disclosure" (*id.* at 24).

ARGUMENT

An employer has a "general obligation * * * to provide information that is needed by the bargaining representative for the proper performance of its duties." *NLRB* v. *Acme Industrial Co.*, 385 U.S. 432, 435-436 (1967), citing *NLRB* v. *Truitt Manufacturing Co.* 351 U.S. 149 (1956). These duties include both the enforcement of an existing collective bargaining agreement (see *NLRB* v. *Acme Industrial Co., supra*) and the negotiation of future agreements (see *NLRB* v. *Truitt Manufacturing Co., supra*). While "[e]ach case must turn upon its particular facts" (351 U.S. at 153), the decisions of the Board—which has a "special understanding of 'the actualities of industrial relations' " (*NLRB* v. *Erie Resistor Corp.*, 373 U.S. 221, 236 (1963), quoting *NLRB* v. *Steelworkers*, 357 U.S. 357, 362-363, 364 (1958))—are entitled to great deference.

Here the Board determined that the information the unions sought was relevant both to enforcing the collective bargaining agreement and to negotiating terms of future collective bargaining agreements designed to prevent evasions of the agreements. Petitioner attacks this determination, but, as the Board and the court of appeals explained, it was plainly reasonable for the Board to conclude that the roster of petitioner's "open shop" members would aid the unions in investigating the extent to which the collective bargaining agreement was being violated by name changes and common ownership operations. As petitioner says, the roster by itself would not identify the violators, but it was plausible for the Board and the court of appeals to believe that the roster would at least be a starting point and would help the unions narrow their inquiry. The investigation, in turn, was necessary so that the unions could "intelligently

evaluate the facts and, thereby, reach their own conclusions on whether or not to pursue remedies for possible contract violations or to seek provisions in the contracts under negotiation which will serve to preserve the integrity of their * * * bargaining units * * *" (Pet. App. C 23-24).[7]

Petitioner cites *Detroit Edison Co.* v. *NLRB*, 440 U.S. 301 (1979), in support of its claim that the Board erred (Pet. 12-13, 15). But in this case, unlike *Detroit Edison*, there is no overriding public interest in the confidentiality of the information sought by the unions; nor is employees' privacy affected. Instead, petitioner's principal objection to the Board's ruling is that disclosure of its roster will aid the unions' organizing efforts. It is not even clear that this is a legitimate reason for refusing to disclose relevant information to a collective bargaining representative; "union solicitation is itself hardly an evil" (*Prudential Insurance Co. of America* v. *NLRB*, 412 F. 2d 77, 84-85 (2d Cir.), cert. denied, 396 U.S. 928 (1969)). Moreover, almost any disclosure of information that helps a union fulfill its responsibilities as a collective bargaining agent may also strengthen the

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[7]Petitioner accuses the Board and the court of appeals of ignoring "[t]he distinction between information regarding [bargaining] unit and non-unit personnel * * *" (Pet. 16-18). But petitioner concedes, as it must, that the only distinction is that certain sorts of information pertaining directly to the bargaining unit are so likely to be relevant to the union's performance of its duties that they are presumed relevant; in other instances, the union must show the relevance of the information it seeks (Pet. 16; see, *e.g.*, *San Diego Newspaper Guild* v. *NLRB*, 548 F. 2d 863, 868 (9th Cir. 1977). Here, the unions showed that the information they requested was relevant, and the Board and the court of appeals accepted their showing. In any event, petitioner's contention amounts principally to an argument that the court of appeals' decision conflicts with *San Diego Newspaper Guild* v. *NLRB*, *supra*, another decision of the same circuit. See *Wisniewski* v. *United States*, 353 U.S. 901 (1957) (this Court does not ordinarily grant certiorari to resolve conflicts between decisions of the same circuit).

union generally and help it acquire or retain majority support in some bargaining unit. In any event, it was reasonable for the Board to conclude that, on balance, the unions' interest in investigating possible violations outweighed any interest petitioner had in thwarting union organizing efforts.[8] In addition, petitioner here, unlike the employer in *Detroit Edison*, has not suggested a reasonable compromise in which the unions would receive the information they need to investigate violations of the collective bargaining agreement.

Petitioner's other challenges to the Board's decision are equally insubstantial. Petitioner appears to contend (Pet. 13, 17) that the unions are not entitled to information that will aid their inquiry into possible violations of the collective bargaining agreement because they did not demonstrate that some of petitioner's members were actually violating the agreement. But the Court had explicitly upheld the Board's use of a "discovery-type standard" under which "the probability that the desired information was relevant, and that it would be of use to the union in carrying out its statutory duties and responsibilities" (*NLRB* v. *Acme Industrial Co., supra*, 385 U.S. at 437) is sufficient; the Board need decide "nothing about the merits of the union's contractual claims" (*ibid.*) before ordering disclosure. The probability that petitioner's roster would be relevant was fully established by the common ownership among petitioner's members that might have been used to evade the collective bargaining agreements (Pet. App. C 18); the name

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[8]Petitioner intimates (Pet. 15) that the Board erred because the unions might make improper use of petitioner's roster. But almost any information can, theoretically, be put to an improper use. See *Utica Observer-Dispatch, Inc.* v. *NLRB*, 229 F. 2d 575, 577 (2d Cir. 1956). Neither the Board nor the court of appeals found any evidence—and petitioner cites none—suggesting any danger that the unions might use petitioner's roster to harass petitioner's members illegally.

changes, presumably to evade collective bargaining obligations, that were common in petitioner's industry (*id.* at 17; Pet. App. A 6-7); and petitioner's encouragement of measures that were designed to avoid collective bargaining agreements but that might have been used to violate those agreements (Pet. App. C 13).

Petitioner also contends (Pet. 18-20) that the Administrative Law Judge determined as a matter of fact that the unions' true motive for requesting petitioner's roster was to organize "open shop" contractors, not to fulfill their responsibilities as collective bargaining representatives. But, as his opinion makes plain (see Pet. App. D 21-23, 25), the Administrative Law Judge's remarks to this effect were based not on an examination of the unions' testimony, statements, or actions, but on the Administrative Law Judge's erroneous view that information about employers who were not subject to the collective bargaining agreement could not possibly be relevant to the unions' performance of their duties as collective bargaining agents. In addition, the Board rejected the Administrative Law Judge's conclusion, holding that it was unsubstantiated by the record (Pet. App. C 4), and the court of appeals upheld the Board (Pet. App. A 20-21 & n.8).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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